UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/499
8 November 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 499

Case No. 496: AMOA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Samar Sen; Mr. Arnold Kean;

Whereas, on 15 August 1988, Rowland Ga-Kwami Amoa, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, and with the agreement of the Respondent, the President of the Tribunal extended until 29 December 1988, the time-limit for the filing of an application to the Tribunal;

Whereas, on 6 January 1989, the Applicant, after making the necessary corrections, again filed an application, containing the following pleas:

"THE PLEAS

THE APPLICANT (APPELLANT) RESPECTFULLY PRAYS THE ADMINISTRATIVE TRIBUNAL OF THE U.N. TO TAKE THE FOLLOWING ACTIONS AND CONSIDERATIONS IN THE CASE OF MR. ROWLAND GA-KWAMI AMOA VS. U.N. SECRETARY-GENERAL.

A. PRELIMINARY MEASURES:

DOCUMENTS

(i) To accept Document (...) as an integral part of my appeal material;

best copy available

(ii) To kindly order the procurement in Headquarters of the following documents of the Organization which have been cited in this application for the Tribunal's use, but whose reproduction by the appellant has proved impractical in view of the poor facilities available to him:

(a) Eight copies of Staff Rules, ST/SGB/Staff Rules/1/Rev. 5 (1979);

(b) Four copies of Staff Rules, ST/SGB/Staff Rules/2/Rev. 6, 1984;

(iii) Where it proves impracticable to procure the documents requested in (ii) above, to kindly accept:-

(a) an integral quotation of Staff Rule 103.23(c) in ..., in lieu of Staff Rules, ST/SGB/Staff Rules/1/Rev.5 (1979);

(b) the photocopies of Staff Rules 203.8.(b) and 205.3(c) included in the ANNEXES in lieu of Staff Rules, ST/SGB/Staff Rules/2/Rev.6, 1984 in four copies of the application.

B. DECISION AND ACTIONS BEING CONTESTED BEFORE THE TRIBUNAL

1. The U.N. Secretary-General's decision of June 1980

(a) That the above decision is legally defective within the Jurisprudence of the United Nations. The Applicant (appellant) demands two years of his normal U.N. salary to compensate for the libel caused;

(b) That the subsequent use of the decision by the U.N. Administration was illegal, injurious to the profession of the appellant and tantamount to an abuse of power by some highly-placed officials of the United Nations.

The Applicant (appellant) respectively demands reparation in the following amounts to be ordered by the Tribunal:

(i) The present value of seven years of his normal U.N. salary. This amount is to be partly offset by a similar present value of whatever amounts the Applicant (appellant) has managed to earn since his normal U.N. service had been damaged by the acts of the Administration against him;

(ii) The Applicant (appellant) respectfully requests a retroactive promotion to the U.N. professional grade of D-2 which the use of the decision had prevented from being effected;

(iii) The Applicant (appellant) further alleges serious moral, mental and social injury from the unlawful acts committed by the Administration. He respectfully demands one year's salary in damages;

(iv) The Applicant requests that he should be immediately reinstated in his capacity as an employee of the Organization.

2. Other Unlawful Acts of the U.N. Administration against the Applicant (Appellant).

(i) That, contrary to the impression of the Joint Appeals Board [JAB], the Administration had exercised bad faith in the delay of the Applicant's (appellant's) appeal in the JAB for seven years. That in one of their depositions on behalf of the Respondent, some members of Administration had lied to the JAB concerning a possible settlement out of court of the case in dispute.

The Applicant respectfully demands punitive damages in consonant with this wilful delay of his appeal;

(ii) The Applicant alleges that the Administration has a case to answer regarding the arbitrary change of his normal contract from annual to monthly basis, six months before the Secretary-General's decision which took advantage of Applicant's made use of the monthly contract, and that the first these monthly contracts had been signed by a highly-placed official of the Administration, as opposed to the story of the Administration that an administrative [sic] had been responsible for the unlawful act.
The Applicant respectfully requests the Tribunal to order punitive damages for this highly arbitrary act which caused him severe physical and mental strains and bears the marks of a cover-up of wrong doing;

(iii) The Applicant respectfully prays the Tribunal to undertake an investigation into possible unlawful acts by some members of the U.N. and ECA [Economic Commission for Africa] officials during the period of 1978 to 1980 in respect of the disciplinary proceedings leading to the decision now under dispute,and draw its own conclusions. The humble

prayer is expanded upon in the last section of the 'Explanation' (according to the scheme of the Tribunal for appeal purposes);

(iv) The Applicant finally prays the Tribunal to order 'as null and void' the various machinations of the Administration to bring his SLWOP [Special Leave Without Pay] to an end as a means of limiting their normal obligations to a U.N. employee, notwithstanding the fact that the order giving the SLWOP, also specified the conclusion of this appeal against the decision of the U.N. Secretary-General as the condition for ending the SLWOP."

Whereas the Respondent filed his answer on 21 April 1989;

Whereas the Applicant filed written observations on 16 May 1989 and requested the amendment of certain paragraphs in Part I of his application;

Whereas, on 1, 18 and 26 April 1990, the Applicant submitted an additional statement and additional documents;

Whereas, on 27 April 1990, the Tribunal put questions to the Respondent and on 3 May 1990, the Applicant submitted comments thereon;

Whereas, on 8 May 1990, the Respondent provided answers to the questions put by the Tribunal;

Whereas, on 17 May 1990, the Tribunal put further questions to the Respondent and on 21 and 23 May 1990, he provided answers thereto;

Whereas, on 21 and 25 May 1990, the Applicant submitted additional statements and documents;

Whereas, on 31 May 1990, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn its consideration of the case until its next session to be held in New York in October 1990;

Whereas, on 5 and 8 October 1990, the Applicant submitted additional statements and documents;

Whereas, on 8 October 1990, the Tribunal put questions to the Respondent and on 12 October 1990, he provided answers thereto;

Whereas, on 19 and 25 October 1990, the Applicant commented on the Respondent's answers to the questions put by the Tribunal and submitted additional documents;

Whereas the facts in the case are as follows:

Rowland Ga-Kwami Amoa entered the service of the United Nations on 6 December 1965, as an Associate Economic Affairs Officer at the Centre for Development Planning, Projections and Policies, in New York. He was initially offered a three month fixed-term appointment at the P-2, Step III level. He served on a succession of fixed-term appointments until 1 October 1967, when he was offered an intermediate term appointment as a Lecturer in Financing of Development at the L-3 level, at the African Institute for Economic Development and Planning (IDEP) in Dakar, Senegal. His appointment was extended for further fixed-term periods through 31 December 1970. On 3 September 1970, the Applicant assumed the functions of Deputy Director and Head of Training, a post at the L-5 level. He continued to serve on a series of fixed-term appointments of different duration, ranging from one month to one year, through 31 December 1979.

During the course of his employment with the United Nations, the Applicant listed as his wife, simultaneously, two different persons for different purposes related to his employment. Upon his recruitment in 1965, the Applicant reported that Esperance Amoa was his dependent spouse for purposes of the U.N. Staff Regulations and Rules. In 1971, the Applicant requested that Elisa Andrade be included in his U.N. Laissez-Passer, for travel purposes and to obtain a residence visa for her in Senegal, the Applicant's duty station. In 1972, Esperance Amoa returned to Ghana, the Applicant's home country. Nevertheless, the Applicant continued to list her as his "dependent spouse" in all U.N. personnel action forms and status reports. At the same time, in July 1972, the Applicant requested that Elisa Andrade Amoa be considered his wife for purposes of the Van Breda Group Medical Hospital and Dental Insurance Scheme (Van Breda). In 1974, he filed a claim for medical expenses incurred in respect of her, and was reimbursed by Van Breda the amount of US$391.77.

In May 1978, in connection with an audit conducted by the Internal Audit Division, the Administration discovered that the Applicant was listing two different persons as his wife for different purposes related to his employment. When the Administration confronted him with the facts, on 13 June 1978, the Applicant wrote a memorandum to the auditors, admitting that "arising from a customary and a de facto conjugal relationship which

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existed between Ms. Elisa Andrade and [himself, he] used her as [his] dependent spouse for the purpose of medical insurance and passport coverage". He argued that "while one can admit a possible misconception, arising from [his] social background, in the interpretation of spouse for the purposes of the United Nations Regulations", he denied there had been "any deliberate falsification ...". The Applicant subsequently requested the United Nations Passport Office in Geneva to cancel his U.N. Laissez-Passer and to issue a new one, removing the name of Elisa Andrade as his spouse. On 13 June 1978, he returned to Van Breda a cheque in the amount of US$391,77, sum which he had received in respect of medical claims filed for his wife Elisa Andrade. He also requested Van Breda to accept claims for reimbursement of all medical expenses incurred in respect of his first wife Esperance since 1972, when he had formally become a participant in the plan. This request was rejected by Van Breda.

On 27 November 1978, the Chief, Staff Services, Office of Personnel Services (OPS), wrote to the Chief, Administration and Conference Services Division, ECA, requesting information concerning the Applicant's conduct and asking what administrative action ECA proposed to take.

On 19 October 1979, the Acting Chief, Division of Administration and Conference Services, ECA, informed the Applicant that his "requests to include another person as [his] spouse on a number of Laissez-Passers seems to involve misrepresentation and a serious violation of the standards of conduct of an international civil servant." He also referred to the filing of the medical insurance claims and in view of the "seriousness of [the] allegations of acts of misconduct" attributed to him, asked him to give his own version of the matter in writing not later than 31 October 1979. The Applicant was also informed that, in accordance with Personnel Directive PD/1/76 concerning "Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva", the Executive Secretary had appointed an ECA offical to conduct an inquiry.

The Executive Secretary appointed an ad-hoc Investigating Team to investigate the allegations against the Applicant. On 30 October 1979, the Applicant appeared before the Investigating Team to explain his position. A summary of the Applicant's statement before the Investigating Team was recorded in a memorandum dated 31 October 1979, from its Secretary. The Applicant was asked to comment on the statement and to submit any evidence he might wish.

In a memorandum dated 2 November 1979, the Applicant provided an explanation to the Acting Chief, Division of Administration and Conference Services, ECA, concerning the allegations contained in his 19 October 1979 memorandum. He argued essentially that the inclusion of Mrs. Elisa Andrade's name on his U.N. Laissez-Passer and his submission of claims for reimbursement of her medical expenses, were actions "derived from an effective and public conjugal relationship according to well-known customary laws". He noted that his first wife Esperance was still his legal and dependent spouse and stated that no change of marital status under Staff Rule 103.23(c) was required since he was still married to her. He argued that he did not inform the United Nations of his second spouse Elisa, because this implied seeking to obtain double privileges and financial benefits. He stated that, in his view, it was legitimate that one of his spouses be covered by his medical insurance and he chose to include Elisa Andrade for this purpose, as Esperance was living in Ghana where "medical expenses ... tend to be minimal". He further stated that since the filing of a medical claim for his second spouse, Elisa Andrade, derived from an effective and public conjugal relationship, according to well-known customary laws of Ghana, the charges of misrepresentation of facts and of fraud were unfounded.

Also on 2 November 1979, the Applicant submitted to the Secretary of the ad-hoc Investigating Team comments on his summary of the interview conducted on 30 October 1979.

On 8 November 1979, the ad-hoc Investigating Team submitted its report on the investigation to the Executive Secretary, ECA. While recognizing the existence of customary marriages, the Investigating Team considered that the Applicant should have notified the Organization of any decision to substitute Elisa, his second customary spouse, for Esperance, his recognized dependent spouse. Having held the position of Deputy Director at IDEP for a considerable time, it was "inconceivable that [the Applicant] should be ignorant of the rule concerning dependency and change of status". The Investigating Team found that except for the Van Breda medical claim, no "financial or material benefit accrued to [the Applicant]" and the "diplomatic privileges Elisa derived ... [could not] be assessed". They concluded however that "the granting of diplomatic privileges to Elisa who is not the recognized spouse of Mr. Amoa for United Nations purposes, appear[ed] ... to be unlawful".

On 10 December 1979, the Chief, Personnel Section, ECA, informed the Applicant that the IDEP Governing Council had decided to extend his appointment "for one final year through 31 December 1980". However, in a handwritten note dated 3 January 1980, is stated an instruction, that the Applicant's fixed-term appointment be extended for only one month, pending the decision by Headquarters concerning the disciplinary case. Accordingly, the Applicant's appointment was extended, first, for one month through 31 January 1980.

On 8 January 1980, the Acting Chief, Division of Administration and Conference Services, transmitted to the Applicant the final investigation report of 8 November 1979 and asked him to submit comments prior to the Secretary-General's decision on the case. He noted that the report had been previously pouched to him on 11 November 1979, but had been "reported not received".

On 31 January 1980, the Applicant submitted his comments and additional information in response to the Investigating Team's report.

The Applicant's appointment was further extended for a fixed-term period of two months, through 31 March 1980.

On 12 March 1980, the Acting Chief, Division of Administration and Conference Services, ECA, transmitted his own evaluation of the Applicant's case to the then Assistant Secretary-General, OPS. The report of the ad-hoc Investigating Team and the Applicant's comments thereon had already been transmitted to the Chief of Staff Services, OPS, at Headquarters. In the Acting Chief's view, the inclusion of Elisa Andrade's name in a number of U.N. Laissez-Passers, when she was not the "spouse" recognized by the Organization, constituted an irregularity, even if the Applicant's customary marriage to her would be recognized in the Applicant's home country. He felt that, in view of the Applicant's long professional experience and his position as Deputy Director, IDEP, he should have known the procedures concerning dependency and change of marital status. He made no specific recommendation on the case but suggested that it be referred to the Office of Legal Affairs, where it could be reviewed in the light of a prior allegation of misconduct against the Applicant.

The Applicant's appointment was then extended for a fixed-term period of three months and 15 days, through 16 July 1980.

On 25 April 1980, the then Assistant Secretary-General, OPS, advised the Secretary-General, through the Legal Counsel and through the then Under-Secretary-General for Administration, Finance and Management, that in his opinion, the Applicant had failed to conform to the highest standards of integrity required for a United Nations staff member, under Article 101, paragraph 3 of the Charter, that he should be considered unfit for further service with the Organization and that his appointment should be terminated. He recommended that the Applicant's month-to-month contract, which was due to expire, not be extended further.

In a reply dated 16 June 1980, the then Under-Secretary-General for Administration, Finance and Management, informed the then Assistant Secretary- General, OPS, on behalf of the Secretary-General, that he agreed with his recommendation.

In a memorandum dated 21 June 1980, the then Director, Division of Personnel Administration (DPA), OPS, informed the Executive Secretary, ECA, of the Headquarters decision not to extend the Applicant's appointment beyond 30 June 1980. The Applicant was notified of the decision by the Officer-in-Charge, IDEP, on 26 June 1980. The Applicant's appointment was further extended through 31 July 1980.

In a cable dated 3 July 1980, the Applicant submitted his resignation to the Executive Secretary, and requested that he be released before the expiration date of his appointment. The Executive Secretary accepted his resignation and the Applicant was separated from the service of IDEP on 16 July 1980.

On 17 July 1980, the Applicant was recruited by the United Nations Institute for Training and Research (UNITAR) as a Special Fellow in Dakar, Senegal.

On 12 December 1980, the Applicant wrote to the then Director, DPA, concerning an unflattering newspaper article which had appeared in Dakar and which brought into question the circumstances surrounding the Applicant's separation from IDEP. On 27 February 1981, his successor transmitted to the Applicant a copy of the report dated 25 April 1980 by the then Assistant Secretary- General, OPS, and a copy of the decision taken on behalf of the Secretary- General, by the then Under-Secretary-General for Administration, Finance and Management, on 16 June 1980.

In a cable dated 21 April 1981, the Applicant informed the Director, DPA, that "... NEITHER PERSONNEL SERVICES NEW YORK NOR INVESTIGATION TEAM EVER QUESTIONED [HIM] ORALLY OR IN WRITING ABOUT SOME OF THE MOST DAMAGING ALLEGATIONS CONTAINED IN [THE THEN ASSISTANT SECRETARY-GENERAL'S (OPS)] REPORT ON THE AFFAIR", and indicated his intention to file an appeal.

On 22 April 1981, the Applicant requested the Secretary-General to review the administrative decision communicated to him on 26 June 1980, not to extend his fixed-term appointment beyond 31 July 1980, for having "failed to conform to the highest standards of integrity required of a United Nations official" and being "considered unfit for continued retention as Deputy Director of [IDEP]". On 17 June 1981, the Applicant filed an appeal with the Joint Appeals Board (JAB) against the decision of 26 June 1980. In view of the late filing of the appeal, the Respondent was asked to submit a preliminary reply on the issue of receivability.

On 17 July 1981, the Executive Director of UNITAR, placed the Applicant on special leave without pay until the Secretary-General took a final decision on the appeal filed by the Applicant on the previous day. On 2 January 1984, the Applicant informed the Organization that he had been compelled to go on an indefinite leave without pay from UNITAR on 17 June 1981, pending the outcome of his appeal. On 9 February 1984, the Executive Director of UNITAR informed the Applicant that his appointment as UNITAR Special Fellow would not be renewed and that his special leave without pay would end on 31 March 1984.

On 19 November 1985, the representative of the Secretary-General submitted the Respondent's reply to the statement of appeal. On the same date, counsel for the Applicant requested the Secretary-General's agreement to submit the appeal directly to the Administrative Tribunal. On 9 December 1985, the then Assistant Secretary-General, OPS, advised counsel for the Applicant that his request for direct submission of the appeal to the Tribunal was rejected as the issue of receivability had not yet been decided.

On 20 March 1986, in response to the denial of the Applicant's request for direct submission of the appeal to the Administrative Tribunal, the JAB indicated its intention to consider the case. The Board adopted its report on 6 May 1988. Its decision, conclusions and recommendations read as follows:

"Decision, Conclusions and recommendations

65. The Panel decides to waive the time-limits for the filing of an appeal in the present case.

66. The Panel concludes that the four year delay in the submission of the Respondent's reply to the statement of appeal, despite the Convening Chairman's decision to grant priority consideration to this case, was directly the result of the Administration's inexcusable failure to provide adequate support for the appeals machinery. Accordingly, the Panel recommends the award of two months' net base salary to the appellant.

67. The Panel concludes further that the appellant had a legitimate expectancy of continued employment until 31 December 1980 and that in accordance with the established jurisprudence of the United Nations Administrative Tribunal the appellant should be compensated for the decision not to extend his contract beyond 31 July 1980. The Tribunal has held (Judgements No. 132, Dale; 142, Bhattacharyya) that such situation may be assimilated to the case of a one year fixed-term contract which is terminated 5 months before its date of expiration. 'In such a situation, a staff member would be entitled to a termination indemnity of one weeks salary for each month of uncompleted service'. Accordingly, the Panel recommends such payment, taking into account the fact that the appellant was re-employed by UNITAR the day following his separation from service with IDEP. Therefore, any such termination indemnity should be reduced by the amount earned by the appellant while serving with UNITAR.

68. The Panel also concludes that the failure to provide the appellant with a copy of Mr. Jonah's [the then Assistant Secretary-General, OPS] contested memorandum did not constitute a violation of due process. The Panel does conclude, however, that the decision not to extend the appellant's contract which was taken in lieu of assigning an appropriate disciplinary measure within the context of paragraph 1 of Staff Regulation 10.2, was improper and constituted an incomplete disciplinary procedure. The Panel concludes further that the maintaining of files and the communicating of information to the effect that the appellant's non-renewal had been for disciplinary reasons, constitutes an abuse of power and is violative of the basic principle of fairness between the Organization and its staff members.

69. Accordingly, the Panel recommends an award to the appellant in the amount of 2 months net base salary. It recommends further that all material relating to the incomplete disciplinary proceeding be expunged from the appellant's files.

70. The Panel makes no further recommendation in support of the appeal."

On 9 June 1988, the Under-Secretary-General for Administration and Management informed the Applicant of the following:

"The Secretary-General has re-examined your case in the light of the Board's report. Considering the entire circumstances of the matter, the Secretary-General has decided, in order to settle your case, to accept the Board's recommendations:

(a) to award you compensation in the amount indicated in paragraphs 66 to 69 of the Board's report for the injuries suffered and the delays in the disposal of your case;

(b) to remove from your official status files all material relating to the incomplete disciplinary proceedings in your case; and

(c) to take no further action on the matter."

On 6 January 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision not to extend the Applicant's appointment was prejudiced and should be declared illegal.

2. The Respondent acted in bad faith in delaying the appeal for seven years.

3. The Respondent's illegal decision not to extend the Applicant's appointment is also libellous and he is entitled to punitive damages.

4. The Respondent referred to a 1974 disciplinary proceeding and this played a central role in his decision of June 1980.

Whereas the Respondent's principal contentions are:

1. The decision by the Respondent not to extend the Applicant's appointment was not prejudiced by reference to an earlier disciplinary investigation in the report submitted by the then Assistant Secretary-General, OPS.

2. In deciding not to extend the Applicant's appointment, the Respondent was entitled to take into account any apparent lapses in judgement of the Applicant, who was serving as Deputy Director of a significant programme.

The Tribunal, having deliberated from 27 April to 17 May 1990 in Geneva, and from 8 October to 8 November 1990 in New York, now pronounces the following judgement:

I. At the outset, the Tribunal would like to make a brief comment on the voluminous documentation in this case, about 300 pages of application with annexes and over 2,000 pages of connected material, including personnel files; obviously, the Tribunal's exhortation in the past that unwieldy presentation of cases is not to be encouraged has still to take effect.

II. On the merits of the case, the Tribunal finds that the Applicant essentially seeks fundamental revision of the conclusions and recommendations of the Joint Appeals Board (JAB) which have been accepted by the Respondent, the Applicant's main plea being that the JAB did not take sufficiently into account the illegal wrongs the Applicant had suffered and was deficient in its analysis and recognition of facts, with the result that the Applicant has been deprived of remedies and compensation to which he believes himself to be entitled. On the other hand, the Respondent points out that inasmuch as some of the pleas before the Tribunal were not before the JAB, the Tribunal is precluded from examining them in terms of Article 7 of its Statute. Since the issues raised in the pleas are closely related to each other, the Tribunal decides to consider them all together, care being taken that specific demands which were not before the JAB will not be passed upon.

III. The JAB has discussed the principal pleas at considerable length and justly commented on the delay caused by the Respondent's failure to submit his answer for over four years. The Tribunal notes that further delay was due to the Applicant's wish, because of the Respondent's dilatory tactics, to submit the case directly to the Tribunal with the Respondent's permission. This permission was refused, and the negotiations which took

place to settle the case in mutually acceptable terms between the parties also failed. This led to yet more delay with the consequence that for eight long years, that is since 1981 when the case was brought before the JAB, its final disposal had not yet taken place. Such delays are utterly irresponsible and obstruct proper justice - documents become old and questionable, persons concerned with the day-to-day dealing of cases disappear and reconstruction of what happened years ago no longer seems feasible. A few senior officials in the Secretariat seemed to be aware of the inordinate delay in the disposal of this case. However, the Tribunal cannot sufficiently condemn the delay that has taken place.

IV. The one and only substantial question before the Tribunal is whether the Respondent's failure to show to the Applicant the memorandum of 25 April 1980, which the then Assistant Secretary-General for Personnel Services (OPS), wrote to the Secretary-General, through the Legal Counsel, constituted an infringement of the Applicant's rights under the relevant procedure for disciplinary cases, either emanating from administrative instructions or from the applicable Staff Regulations and Rules. The memorandum in question was prepared as a follow-up action of an investigation instituted by the Respondent on the allegation that the Applicant had two wives. The first marriage was supported by documentary evidence, while the second was considered to be customary, but generally recognized in Dakar where the Applicant was working. The investigation also included several alleged financial and other irregularities, such as including one wife (Esperance) as his dependent and the other (Elisa) for a United Nations Laissez-Passer, medical insurance and some undefined privileges. The investigation was thorough, and established that the Applicant's omission to declare his second marriage and his failure to take action in time to adhere strictly to the rules and regulations on these matters, were irregularities even though he or his second wife (or her children by another marriage) did not in practice receive much, if any, financial advantage through these omissions and failures on the Applicant's part. The report of the Investigating Team was shown to the Applicant and his comments obtained in accordance with Personnel Directive PD/I/76 of 1 January 1976 entitled "Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva".

V. The Respondent maintains that inasmuch as the Investigation Team report was shown to the Applicant and he commented upon it, the relevant provisions of PD/1/76 have been completely carried out. He has also asserted that the terms of PD/1/76 do not preclude the Assistant Secretary-General, OPS, from making such summaries, comments and recommendations as he wishes to include in his submission to the Secretary-General. The Respondent further argues that there was nothing in this memorandum to the Secretary-General which was not known to the Applicant and on which he had not already had an opportunity to comment. Finally, he contends that it was an internal communication between seniormost officers who were concerned with taking a comprehensive view of a staff member's suitability and therefore such a memorandum does not fall within the purview of PD/1/76. Thus, there is no obligation to show it to the staff member concerned for his comments or rebuttal.

VI. The Applicant disagrees completely and states that, apart from the prescribed procedure, the memorandum in question offends the general sense of fairness, if not the Applicant's specific rights, in three ways: first, by raising the issue of an earlier incident in which the Applicant was involved in importing chemicals in the name of IDEP, but in fact meant for his friends or relatives, the memorandum tends to prejudice the Secretary-General against the Applicant, especially as the Applicant had been found to be blameworthy only for a "lapse of judgement"; secondly, many of the facts were not accurately stated, e.g. the withdrawal of the Applicant's resignation at the time the import of chemicals was being enquired into, the whereabouts of Mrs. Elisa Andrade (the Applicant maintains that he was never questioned about this); failure to establish proof of his marriage to Mrs. Elisa Andrade; thirdly, several people who were unfavourably disposed towards the Applicant were directly or indirectly able to influence this submission to the Secretary-General and therefore the presentation was vitiated by prejudice.

VII. The Tribunal has not been able to find any substance in these allegations and is of the opinion that it was not necessary for the Respondent to communicate to the Applicant the contents of the memorandum of 25 April 1990, from the then Assistant Secretary-General, OPS, to the Secretary- General through the Legal Counsel.

The Tribunal has also examined the circumstances in which the Applicant was recruited by UNITAR on 17 July 1980 and subsequently given seemingly unlimited leave without pay. The Tribunal does not consider that the Applicant is entitled to any compensation for the complications and irregularities that may have arisen as a result of UNITAR's action in putting him on leave without pay.

VIII. The Tribunal agrees with the JAB that the confusion about whether to separate the Applicant through disciplinary action or through recourse to the easy and quick device of ending his fixed-term contract, should have been avoided. It would have been more straightforward to follow one or the other course, and not to institute a disciplinary case and then end up with the sudden termination of a month-to-month fixed-term contract. For this lack of due process, the Applicant is entitled to some compensation, as determined by the JAB.

IX. However, the Tribunal does not question the right of the Respondent to judge comprehensively the suitability of any staff member for any appointment on the basis of all available data; this right can be challenged when it could be established, inter alia, that the assessment is vitiated by prejudice or any other extraneous factors. In the present instance, the right of the Respondent is not being impugned, but it is asserted that the procedure followed has infringed due process by confusing disciplinary action with discretion not to renew a fixed-term contract.

X. In view of the above and in the light of the recommendation already made by the JAB and accepted by the Respondent, the Tribunal is of the view that the Applicant is not entitled to any further relief for the wrongs he has suffered. The Tribunal also approves of the JAB's conclusion that the Applicant could normally have expected to continue to serve on short fixed-term appointments until the end of 1981, and that the decision to employ the Applicant on a month-to-month basis, even if it was within the Respondent's power and was known to the Applicant, was taken without sufficient justification.

XI. The Respondent has informed the Tribunal that according to the award made by the JAB in paragraphs 66 and 69 of its report, the amount due to the Applicant is US$10,931.20 and that nothing is due to him under paragraph 67 of the JAB report as "the salary he received from UNITAR, Dakar, for the period 17 July 1980 through 16 July 1981 far exceeded the maximum termination indemnity of [US]$3,153.25 (weekly net base pay of [US]$630,65 times by 5 months of uncompleted service)". The Tribunal accepts these calculations and confirms that a sum of US$10,931.20 is due to the Applicant.

The Tribunal notes, however, that there has been much delay in calculating the amount due to the Applicant as recommended by the JAB, and that, for one reason or another, no payment has been made to the Applicant. The Tribunal, therefore, considers it appropriate that the Applicant should be entitled to receive 10 per cent interest (compounded each year) on US$10,931.20 from 9 June 1988 - when the JAB's recommendation was accepted by the Respondent - until the date when payment is finally made to the Applicant.

XII. Accordingly, the Tribunal orders the Respondent to pay the Applicant the sum of US$10,931.20, plus 10 per cent interest (compounded each year) on US$10,931.20 from 9 June 1988 - when the JAB's recommendation was accepted by the Respondent - until the date when payment is finally made to the Applicant.

XIII. For the foregoing reasons and except as provided in the preceding paragraph, the application is rejected in its entirety.
(Signatures)

Roger PINTO
President

Samar SEN
Member

Arnold KEAN
Member

New York, 8 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/500
9 November 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 500

Case No. 516: PAPPAS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Francisco A. Forteza;

Whereas, at the request of Anna Mamalakis Pappas, a former staff member of the United Nations Institute for Training and Research, hereinafter referred to as UNITAR, the President of the Tribunal, with the agreement of the Respondent, successively extended to 1 June and 5 July 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 5 July 1989, the Applicant filed an application, containing pleas which may be summarized as follows:

The Tribunal is requested to find that:

1. (i) The period of service from 14 February to 13 March 1983, during which the Applicant was intermittently on leave; and
(ii) The period from 1 June to 31 December 1986, when the Applicant was on leave without pay,

be made pensionable;

2. That:
(i) The periods of service when she was considered as working for less than half the time of full-time staff members should be considered as being at least half that time; and that

(ii) Other periods, which were considered as less than full time, should be treated as full-time employment.

3. That salaries, annual and sick leave benefits and medical subsidies for the additional periods listed in 1(i) and (ii) above, be paid to the Applicant.

4. That retroactive reformation attach to all relevant employment instruments relating to the Applicant, to reflect 1, 2 and 3 above, and that her entitlement to salaries and other benefits and to pension emoluments should reflect such reformation.

5. That throughout her tenure at UNITAR, the Applicant was subjected to discriminatory treatment on account of her sex and nationality and to grant appropriate relief.

Whereas the Respondent filed his answer on 26 February 1990:

Whereas the Applicant filed written observations on 30 July 1990:

Whereas, on 6 September 1990, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 21 September 1990, the Respondent provided answers thereto:

Whereas, on 2 October 1990, the Applicant commented on the Respondent's submission and submitted additional documents;

Whereas, on 8 October 1990, the Respondent submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNITAR on 1 October 1980. She was initially offered a five-month temporary appointment from 1 October 1980 to 28 February 1981, to work one day a week, on a project entitled "Rights of the Child". The conditions of her employment were set forth in a "Letter of Award", which stated that the Applicant would receive "a remuneration at the rate of US$500 ... per month" and would "not be entitled to any other payment or benefit". The Applicant's appointment was then extended first, for a further fixed-term period of six months, as a Research Associate, from 1 March to 31 August 1981, on the same terms and conditions, except that she was to perform work two days a week and would be entitled to US$1,000 per month.

The Applicant then accepted a further one year extension of her Letter of Award, from 1 August 1981 to 31 July 1982, under specified terms and conditions. She was required to work four days a week and her "sole remuneration ... [would] be a monthly payment of US$2,000 ...". This Letter of Award provided that the Applicant would "be granted no other benefit or entitlement", but under a section on General conditions, it was specified that during the tenure of the appointment, the Applicant would "have the status of an official of the United Nations in accordance with Article 105 of the Charter of the United Nations and Article V of the UNITAR Statute" and that the general conditions of her service would be "governed by the United Nations Staff Regulations and Rules as applicable to staff specifically engaged for short-term service".

On 20 July 1982, the Applicant asked the Chief, Finance and Administration, to extend her contract for five days a week, with a corresponding increase in remuneration. She argued, in support of her request, that since October 1980, she had "worked on an average of two days per week ... without compensation".

Effective 1 August 1982, the Applicant accepted a further five-month extension of her Letter of Award, with an expiration date of 31 December 1982. The Applicant agreed to work five days a week, and she was to receive remuneration of US$2,500 per month. The extension provided that all the terms and conditions of the Applicant's employment remained unchanged.

In a letter dated 17 December 1982, the Applicant reiterated that she "worked on an average of two days per week ... from October 1980 to July 1982 ... without remuneration", and noted that she had "not [had] one day's vacation or sick leave". She stated she had "shown willingness to volunteer [her] services, but this should not apply if there are funds available for even token remuneration".

The Applicant was subsequently offered a further extension, from 1 January to 30 June 1983, on the same terms and conditions set forth in the previous Letters of Award. On 7 January 1983, the Applicant wrote to the Chief, Finance and Administration, asking that consideration be given to granting her "prospective annual and sick leave benefits" as well as a

salary increase. She reiterated that she had worked "an accumulated total of 5 1/2 months without any remuneration" and without "one day's vacation or sick leave from October 1980 ...".

In a further communication dated 7 February 1983, the Applicant informed the Chief, Finance and Administration, that, for health reasons and to attend to personal matters, she intended to take "a leave of at least three weeks" commencing on 14 February 1983. She proposed that the appointment previously offered to her should run from 1 March 1983 through 31 August 1983, and offered to forego receiving remuneration for January and February 1983, but would "appreciate being reimbursed retroactively" for those two months in the event funds subsequently became available.

The Applicant returned to work on 14 March 1983, without accepting UNITAR's offer to extend her appointment for the period running from 1 January to 30 June 1983. On 24 March 1983, the Chief, Finance and Administration, informed the Executive Director of the Applicant's contractual situation and of the Applicant's requests for annual leave and additional remuneration. On the same date, the Chief, Finance and Administration, informed the Applicant that UNITAR would "not continue to give Letters of Award except for the extension of an already existing contract" and that he was "not sure whether it [would] be possible to add benefits...". According to the Applicant's statement to the Joint Appeals Board (JAB), "while [she] was in this contractual limbo, [she] necessarily and as a matter of urgency had to work to see the project to conclusion, and did continue to do so to everyone's full knowledge". In August 1983, the Applicant met with the Executive Director and on 21 September 1983, accepted a new Letter of Award for a fixed-term period of six months, retroactive from 1 July 1983 through 31 December 1983. The remuneration was US$3,300 per month. The terms and conditions of the appointment were the same as those stipulated in prior Letters of Award.

On 1 January 1984, the Applicant was offered a new appointment as a Project Officer, to manage a project on the New International Economic Order and on the Covenant on Economic, Social and Cultural Rights. The conditions of her employment were set forth in a fresh Letter of Award dated 12 January 1984, for a fixed-term period of nine months, through 30 September 1984.

This Letter of Award provided for monthly payments of US$2,500 for four days work per week. The Applicant was also eligible for annual and sick leave at the rate of two days per month, with the proviso that it "should be taken prior to the expiration date of [the] appointment". The Applicant was also eligible for a termination indemnity and to compensation in the event of death, injury or illness attributable to the performance of official duties.

In early October 1984, the UNITAR Administration offered the Applicant a new fixed-term appointment of three months, with effect from 1 October 1984, as a Project Officer/UNITAR Fellow, with remuneration of US$4,000 per month and no other benefits. On 30 October 1984, the Applicant wrote to the Administrative Officer, asking for an extension of her prior Letter of Award, rather than accepting the new offer. She stated that her previous Letter of Award provided for the first time, for annual and sick leave entitlements that she did not wish to relinquish. The Applicant maintained her position that she would not sign the appointment until the Administration replied to her requests.

On 11 January 1985, the Applicant executed "in spite of [her] objections to it", with retroactive effect, a Letter of Award covering the period of service running from 1 October to 31 December 1984. In a covering memorandum, she reminded the Executive Director that she had "accumulated [annual] leave for the period [of] 1 January to 30 September 1984" and that the Executive Director had "orally agreed" that she was "entitled to leave for the period 1 October to 31 December 1984". The Executive Director subsequently agreed that the Applicant should be paid, in commutation of any accumulated leave under her previous appointments, but she was to receive no annual leave under the new appointment (covering the period running from 1 October to 31 December 1984). If the Applicant required some time off, the Applicant and the Executive Director would discuss it, "as an unofficial measure". According to the Applicant's personnel file, the Applicant was eventually paid US$1,724.10 in commutation of 15 days of her accrued annual leave "through September 1984".

The Applicant was subsequently granted a six-month fixed-term appointment as a Project Officer at the L-3, Step III level, under the 200 Series of the Staff Rules, running from 1 January 1985 through 30 June 1985.

The Applicant's appointment was further extended for fixed-term periods, through 31 May 1986. Effective 1 June 1986, the Applicant was granted special leave without pay, until 31 December 1986, on which date she separated from the service of the Organization.

As regards her status in the Pension Fund, the Applicant became a participant on 1 June 1985.

On 23 December 1985, the Applicant requested the Secretary of the UNJSPF to validate her prior non-contributory service with UNITAR. Other staff similarly appointed under Letters of Award had made similar requests.

On 31 March 1986, the Executive Director wrote to the Secretary of the UNJSPF concerning claims for validation of non-contributory service with UNITAR by holders of Letters of Award, such as the Applicant. He asserted that he had found no written evidence to contradict "the mutual understanding by UNITAR Administration and the holders of LOA [Letter of Award] contracts that pension entitlement was among the excluded benefits." He noted that a legal concession by UNITAR could have serious financial consequences. He proposed that previous service under Letters of Award be validated for pension purposes for seven claimants, not including the Applicant, in respect of whom the Executive Director stated:

> "... As regards Mrs. Anna Pappas' case, we are unable to accept her claim for revalidation from October 1980 as she was only a part-time research associate from 8 October 1980 to 31 July 1982 and alternated between part-time and full time work from 1 August 1982 to 31 December 1984, with a break of service from January to June 1983."

In a reply dated 16 May 1986, the Secretary of the UNJSPF challenged the Executive Director's conclusion that "there was no doubt on both sides about the deliberate exclusion of pension benefits in the LOA [Letter of Award]". He noted that under article 21 of the Pension Fund's Regulations, in order to exclude a staff member from participation in the Pension Fund, the exclusion "must be clearly spelled out by the terms of his appointment. In other words, under the Fund's Regulations, exclusion must be explicit, and not merely implied". As regards the Applicant, he stated:

"With respect to Mrs. Pappas' case, please note that supplementary article A of the Regulations of the UNJSPF specifies that all the Regulations and Rules of the Fund including article 21 'apply equally' to the staff members who serve on part-time basis 'for at least half the time of full-time members of the staff...' Article 23 permits validation of non-contributory service that is not broken by more than one year at a time. In light of these provisions, you may wish to review Mrs. Pappas' case once again".

In a letter dated 26 January 1987, the Executive Director proposed to the Applicant to recognize contributory service during her employment with UNITAR under several Letters of Award (1 August 1981 to 31 December 1984, for 31 months of the Applicant's service. He agreed that as during that time, the Applicant worked at least four days a week, she would be credited proportionately with part time contributory service, in accordance with Supplementary Article A of the Pension Fund's Regulations. As regards the periods during which the Applicant worked only one or two days a week and her 1 January - 30 June 1983 break in service, they would not be credited as UNJSPF contributory service. The Executive Director, as part of his settlement, offered to retroactively amend her Letter of Award dated 1 August 1981, so that her UNJSPF participation could commence as of that date.

In a letter dated 2 March 1987, the Applicant partially accepted the Executive Director's proposal. She asserted, however, that she was entitled to full UNJSPF participation during 1 February - 31 July 1981, since she had worked full time. In a reply dated 7 May 1987, the Executive Director informed the Applicant that since she had worked only one day a week from 1 October 1980 to 28 February 1981, and only two days a week from 1 March to 31 July 1981, she was not eligible to participate in the UNJSPF under Supplementary Article A of the Pension Fund's Regulations, which require at least half-time employment for UNJSPF participation.

In a letter dated 6 July 1987, the Applicant, in accordance with staff rule 111.2(a), requested review of the administrative decision to deny her UNJSPF participation during the 1 October 1980 - 28 February 1981, 1 March - 31 July 1981 and 1 January - 30 June 1983 periods. She also claimed that she was entitled to remuneration in those periods for actual work time, plus remuneration for accrued annual leave unlawfully withheld

from October 1980 to January 1985. In addition, the Applicant claimed an entitlement to a retroactive upward "adjustment" in her grade level, justified in her view, on the clear pattern of gross discrimination by UNITAR against women who were U.S. nationals.

Not having received a reply from the Secretary-General to her request for administrative review, on 22 September 1987, the Applicant filed an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 11 November 1988. Its conclusions and recommendations read as follows:

"Conclusions and recommendations

47. The Panel concludes that the professional commitment of the appellant and the extra time she expended on her projects over and above the terms and conditions of her employment were neither unique nor unusual as numerous staff members at the Professional and higher categories routinely work or may be required to work extra time without compensation.

48. The Panel also concludes that the Organization owes the appellant an amount equal to five months net base salary at the rate of $3,300.00 gross per month and concomitant benefits, specifically annual and sick leave entitlements, and medical and dental subsidies, as well as six months full pension entitlements for the services she rendered to the Organization during the period 1 January 1983 to 30 June 1983.

49. The Panel further concludes pursuant to Articles 22(b) and 25(b)(i) of the UNJSPF Regulations that the appellant was entitled to full pension coverage for the period 1 June 1986 to 31 December 1986 when she was on leave without pay.

50. Furthermore, the Panel concludes that the appellant's pension entitlements have met the requirements for vesting under the Regulations of UNJSPF.

51. In addition, the Panel concludes that the appellant did not sustain the burden of proof required to establish that she had been subjected to discriminatory treatment based on gender or nationality.

52. Moreover, the Panel concludes that the aborted settlement agreement reached on 16 October 1988 appeared to have been equitable and to have conformed to the requirements of the Regulations and Rules of the UNJSPF and regrets that it did not come to fruition.

53. Accordingly, the Panel recommends (i) the payment to the appellant of an amount equal to five months net base salary at the rate of $3,300.00 gross per month, plus payment for annual and sick leave entitlements, and medical and dental subsidies for the period 1 January 1983 to 30 June 1983; (ii) the recognition of six months full pension entitlements for the appellant for the period 1 January 1983 to 30 June 1983; (iii) the recognition of seven months full pension entitlements for the appellant for the period 1 June 1986 to 31 December 1986 when she was on leave without pay: and (iv) recognition that the appellant's full pension entitlements cover in total a period of five years and one month, which meets the requirements for vesting her pension entitlements.

54. The Panel makes no further recommendation in support of the appeal."

On 23 January 1989, the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and advised her that:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided, in final settlement of your case, to pay you an amount equal to five months' salary at the rate of $3;300.00 gross per month for the period 1 January 1983 to 13 February 1983 and 14 March 1983 to 30 June 1983, in recognition of the work you performed for UNITAR during such period. However, no other benefits or entitlements can be granted to you in addition to your remuneration, since UNITAR did not agree to such payments for the above period and also excluded any other benefits or entitlements for your service prior and subsequent to that period.

The Secretary-General has also decided, to grant you the pension emoluments due to a staff member for the period in question, excluding the one-month period when you were on leave without pay, since you did not pay the full contributions due to the Pension Fund concurrently with such leave as required by the United Nations Joint Staff Pension Fund Regulations. Likewise, the period 1 June 1986 to 31 December 1986, when you were also on leave without pay and failed to make the necessary concurrent contributions, remains non-contributory and therefore non-pensionable. Consequently, you do not meet the requirements for vesting your pension entitlements since your legitimate pension entitlements cover less than a five-year period."

On 5 July 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's terms of appointment during several periods between 1 October 1980 and 31 December 1986, did not accurately reflect the services she performed and the remuneration, fringe benefits and pension entitlements arising therefrom.

2. The above discrepancy was due to a policy of discrimination against her based on sex and nationality.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim to retroactive payment of salary and certain allowances and benefits is time-barred under Staff Rule 103.15.

2. The Respondent is not legally obligated to compensate the Applicant other than as provided under the terms and conditions of her contracts of employment.

3. The Applicant has been credited with contributory service in the UNJSPF in accordance with the terms and conditions of her employment contracts and the Regulations of the UNJSPF.

4. The Applicant has not discharged the burden of proof to show that the Respondent treated her in a discriminatory fashion.

The Tribunal, having deliberated from 15 October to 9 November 1990, now pronounces the following judgement:

I. In this case, the Applicant alleges that during the period of her employment with UNITAR, the Administration denied her the benefits to which she was entitled by virtue of the services she had rendered. She further claims that such denial of her rights was on account of discrimination based on her sex and/or her nationality.

II. Before entering into the merits of the case, the Tribunal will dispose of preliminary issues.

III. In his answer, the Respondent contends that, claims by the Applicant for retroactive payment of salary and certain allowances and benefits due to her are time-barred, under Staff Rule 103.15. In support of his contention, the Respondent refers to Judgement No. 392, Joiner (1987). The Tribunal does not find it necessary to address the Respondent's argument based on the Joiner case.

IV. However, the Tribunal notes that following the proceedings before the Joint Appeals Board (JAB), the Respondent waived any recourse to time-limits. In his letter dated 23 January 1989, the Respondent, after referring to the JAB report on her case, informed the Applicant that he had decided to pay her an amount "of US$3,300 ... per month for the period 1 January 1983 to 13 February 1983 and 14 March 1983 to 30 June 1983, in recognition of the work [she] performed for UNITAR during such period".

As this payment relates to a period for which a claim to salary would have been, under the Respondent's theory, time-barred under Staff Rule 103.15, the Respondent is estopped from invoking that rule in his answer before the Tribunal.

V. The Tribunal will now turn to the substance of the Applicant's claims:

(i) The first claim relates to prospective entitlements due to the Applicant from the U.N. Joint Staff Pension Fund (UNJSPF). She claims she was denied these entitlements on account of UNITAR's failure to ensure that all periods of service during which she was entitled to accrue contributory service in the Pension Fund, were in fact credited to her. As a result, at the time of her separation from service, she had not completed the five year period of contributory service required for entitlement to a pension;

(ii) The second claim relates to inadequate remuneration and to the denial of fringe benefits in respect of work she actually performed, resulting from either not being given any contract for certain periods when she performed work, or from her performing more work than was called for in the contract. The fringe benefits to which she claims she was entitled are annual leave, sick leave and health insurance coverage.

VI. The Tribunal notes that while the claims under (i) and (ii) in paragraph V above are, to some extent, interdependent, they must be considered separately because of the differences in procedure which apply to their resolution. While the JAB is the appropriate body to deal with claims under (ii), it was competent to deal with those under (i), only to the extent that they involved a determination of whether the Respondent had fulfilled his obligations to arrange for the Applicant's participation in the Pension Fund during all the periods when she was entitled thereto.

VII. The JAB had no competence to deal with whether the Applicant was entitled to any of the rights resulting from the participation in the Pension Fund which she claims she was denied. These rights are determined by the Regulations of the UNJSPF, and consequently, the only organs competent to deal with them are the organs of the Pension Fund. The Tribunal will not consider any claims involving such rights unless and until they have first been considered by the United Nations Joint Staff Pension Board.

VIII. In particular, the JAB did not have jurisdiction to consider the Applicant's claims relating to the recognition of a period of leave without pay from 1 June 1986 to 31 December 1986, as contributory service, under the UNJSPF Regulations and Rules.

IX. The Tribunal therefore finds that the conclusion reached by the JAB that "the appellant's pension entitlements have met the requirements for vesting under the Regulations of the UNJSPF "were outside the sphere of its competence.

X. According to information provided to the Tribunal by the Respondent, on 21 September and 8 October 1990, the Respondent acknowledges, and the Applicant agrees, that the Applicant was a participant in the Pension Fund from 1 August 1981 through 31 December 1982, and from 1 July 1983 through 31 May 1986. The Applicant commenced her employment with UNITAR on 1 October 1980. According to the Applicant's Letters of Award, she was working from 1 October 1980 to 28 February 1981, one day a week in

consideration for US$500 a month and from 1 March to 31 August 1981, two days a week in consideration for US$1,000 a month. During the period from 14 February to 13 March 1983 and from 1 June to 31 December 1986, the Applicant was on special leave without pay.

XI. The Applicant claims the following:

(a) During the period 1 October 1980 to 31 July 1981, when she was deemed not to qualify for participation, under Supplementary Article A of the Pension Fund Regulations, because her employment was for less than half the time of full time members of the staff, she did in fact perform enough work to qualify for participation and therefore this period should be treated as contributory;

(b) The periods 1 August 1981 to 31 July 1982 and 1 August 1982 to 31 December 1982, which though credited as contributory service, should have been credited as full-time service, instead of being considered under the Pension Fund Regulations as part time service, with the entitlements derived therefrom reduced in the ratio that employment bore to full-time employment, as provided in Supplementary Article A of the Regulations of the Fund; and that

(c) The periods 14 February to 13 March 1983 and from on or about 1 June to 31 December 1986, when the Applicant was on leave without pay, should be pensionable.

XII. The Tribunal finds that, under the terms of the Applicant's employment, the periods under (a) and (b) of the preceding paragraph were correctly treated by the Respondent and the Pension Fund for pension purposes. No change could be made unless the request by the Applicant "that retroactive reformation attach to all relevant employment instruments ... relating to the Applicant" were granted by the Tribunal. However, the Tribunal finds no reason to do so.

XIII. A contractual relationship between the Applicant and UNITAR existed in the period of 1 October 1980 to 31 December 1986. During that period the status of the Applicant was that of a staff member, either in full or part-time employment, including two periods of leave without pay. Her entitlements from the Pension Fund were determined by that status.

XIV. With regard to the periods of leave without pay, under paragraph XI(a) above, the provisions of the Pension Fund Regulations require that, for leave without pay to be considered contributory service, contributions to the Pension Fund must be paid concurrently therewith. The periods in question cannot be so counted, since no such contributions were paid.

XV. The Tribunal notes, in this connection, that this case may be distinguished from Isaacs (Judgement No. 423 (1988)). In Isaacs, the Tribunal was asked to examine whether the contractual provisions in the Applicant's letters of appointment conformed with UNITAR's obligations towards her, with regard to her status in the Pension Fund. In the case under consideration, the Tribunal is being asked by the Applicant to retroactively alter the terms of her appointment in order to make them conform to the requirements for accumulating contributory service under the Regulations of the Pension Fund.

XVI. The Applicant contends that the terms of her part-time employment did not accurately reflect the actual work she performed and should therefore be rewritten to conform thereto, with the resulting consequence, inter alia, that the entire period during which she held contracts for part-time employment would count as contributory service for pension purposes on the basis of full-time employment.

XVII. This claim must fail as far as pension entitlements are concerned, as under the Regulations of the Pension Fund these are determined not by the amount of work accomplished, but by whether employment is either full-time or part-time, the latter being defined as employment for at least half the time of full-time staff members (Supplementary Article A).

XVIII. As the Applicant has been credited, for pension purposes, with all the service that corresponds to the definition in Article 1(u) and in Supplementary Article A of the Pension Fund Regulations, no adjustment has to be made. Should she again qualify in the future for participation in the Fund, and be entitled to restore prior service, it is that service which she could restore.

XIX. The Tribunal now turns to the Applicant's pleas regarding certain fringe benefits. The Tribunal notes that her claim to leave entitlements was considered by the JAB which noted that she had been paid the sum of US$1,724.10 for accumulated annual leave under the appointments previous to the one granted from 1 October to 31 December 1984.

XX. However, with regard to subsequent periods of employment, the Applicant is entitled to compensation for accumulated annual leave.

XXI. The Tribunal will make no award with regard to sick leave, as the Staff Regulations and Rules do not provide for payment in respect of unused sick leave. The Applicant does not allege that she was denied sick leave during employment.

XXII. As regards claims to subsidies for medical and dental insurance, the Tribunal is unable to entertain them. There is no evidence that the Applicant asked for coverage under the U.N. schemes and that she was denied the coverage thereunder, which is granted to other staff members requesting it.

XXIII. Finally, with regard to the general allegation that her treatment was due to discrimination directed against her, the Tribunal finds no evidence to support it. The Applicant might have merited employment at a higher grade with higher pay, but she consented to the terms offered to her. The Applicant may regret having demonstrated a willingness to work hard, even beyond the call of duty, on the projects on which she was engaged, and to which she was dedicated. The Tribunal concurs with the JAB's conclusion that as a professional staff member she could be required "to work extra time without compensation".

XXIV. For the foregoing reasons, the Tribunal finds:

(a) That the Applicant is entitled to compensation for unused leave under her contracts of employment subsequent to 30 September 1984, in respect

of periods for which she was remunerated, either during her employment, or subsequently, by the Secretary-General's action on the recommendations of the JAB;

(b) All other claims are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

New York, 9 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/501
9 November 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 501

Case No. 520: LAVALLE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Francisco A. Forteza;

Whereas, on 5 September 1989, Roberto Lavalle, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application, containing the following pleas:

"II. PLEAS

4. Applicant respectfully requests the Tribunal to declare the decision contested illegal, order its rescission and fix the compensation due to him, should Respondent decide that he is to be compensated without further action being taken, at three years net base salary."

Whereas the Respondent filed his answer on 24 January 1990;

Whereas the Applicant filed written observations on 9 February 1990;

Whereas, on 24 September 1990, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 2 October 1990, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 24 October 1968. He was initially offered a probationary appointment at the P-3 level, as Assistant Secretary of the Economic and Social Council. On 1 September 1970, the Applicant was transferred to the General Legal Division of the Office of Legal Affairs (OLA) as a Legal Officer. On 1 October 1970, he was granted a permanent appointment. On 1 April 1972, he was promoted to the P-4 level . On 1 September 1977, he was assigned to the Buenos Aires Office of the United Nations High Commissioner for Refugees until 31 March 1978, when he returned to the General Legal Division, OLA. On 1 September 1979, he was transferred to UNEP, where he worked as Legal Liaison Officer, until his separation from service on 21 May 1986. During his period of service with UNEP, the Applicant was designated Deputy Secretary of the UNEP Governing Council with effect from 29 June 1981.

On 5 March 1985, the Executive Director informed the Governing Council of UNEP, in UNEP/G.C.13/12, on "Proposed Budget for Programme and Programme Support Costs of the Environment Fund for the Biennum 1986-1987", that in reviewing "the distribution of posts between the regular budget and the programme and programme support costs budget", he had decided to "make a further effort to rectify [the] situation in which the Environment Fund bears part of costs which should normally be financed from the regular [U.N.] budget". He was therefore proposing to transfer six posts (one D-1, one P-5, one P-4 encumbered by the Applicant and three local level posts) from UNEP's programme support budget to the U.N. regular budget. The Executive Director did not ask for an additional contingency appropriation to absorb the cost resulting from the possible non-approval of his proposal. Instead, he suggested that any additional costs resulting from non-approval of the transfer of those posts to the U.N. regular budget, be absorbed within the approved appropriations.

On 13 May 1985, the Executive Director advised the Governing Council in UNEP/G.C.13/L.5, that the Advisory Committee on Administrative and Budgetary Questions had approved the transfer to the U.N. regular budget of only one P-5 post. Consequently, and in order to be able to absorb the additional costs resulting from the non-approval of the transfer of the

other five posts, the Executive Director informed the Governing Council that he planned to abolish the P-4 post of Legal Liaison Officer encumbered by the Applicant.

On 18 May 1985, the Applicant wrote to the Assistant Executive Director, Environment Fund and Administration, stating that he had just learned from reading document UNEP/G.C.13/L.5 of 13 May 1985, that the Executive Director planned to abolish his post, action which he found "surprising". He stated he was confident that the Executive Director would respect the requirements of Staff Rule 109.1(c)(i) concerning the Secretary-General's obligations to staff serving on permanent appointments in cases of abolition of posts and asked to be considered for the post of Head of the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals, which was to become vacant.

The Governing Council, at its 13th session held on 23 May 1985, approved the Executive Director's budget proposal in its decision 13/35.

In a memorandum dated 11 June 1985, copied to the Applicant, the Assistant Executive Director of UNEP informed the Assistant Secretary-General for Personnel Services (OPS) that the UNEP Governing Council, at its thirteenth session, had endorsed the Executive Director's proposal "not to reinstate the post of Legal Officer in the Office of the Executive Director" and that the post would be abolished effective 1 January 1986. He sought his assistance to find a position for the Applicant in the Secretariat, in accordance with Staff Rule 109.1(c)(i).

According to a statement by the Respondent, "in order to provide further time to find a post for Applicant, UNEP maintained him in service against two 'borrowed posts' until 21 August 1986, i.e., for a period of almost eight months after abolition of his post... During that time, UNEP and the Office of Personnel Services at Headquarters unsuccessfully tried to find an alternate positi . for Applicant". The Applicant himself applied for a series of posts.

On 30 April 1986, the Under-Secretary-General for Administration and Management approved the termination of the Applicant's appointment under Staff Regulation 9.1(a) with effect from 30 April 1986.

On 5 May 1986, a Personnel Officer at Headquarters asked the Chief of Personnel Section at UNEP, to inform the Applicant that the Secretary-General had approved the termination of his permanent appointment for abolition of post under Staff Regulation 9.1; and that he would be paid a termination indemnity and three months' compensation in lieu of notice, in accordance with Annex III of the Staff Regulations and Staff Rule 109.3(c).

In a letter dated 6 May 1986, the Assistant Secretary-General, OPS, communicated to the Applicant the Secretary-General's decision, stating his regret that "the necessities of the service required the abolition of [his] post and all efforts to place [him] elsewhere in the Secretariat as well as the U.N. system were negative".

On 21 May 1986, the Applicant separated from the service of UNEP.

On 27 June 1986, the Applicant asked the Secretary-General to review the administrative decision to abolish his post. On 18 September 1986, the Applicant lodged an appeal with the Nairobi Joint Appeals Board (JAB).

The Applicant was then offered a series of short-term appointments: he served from 1 December 1987 to 20 May 1988 with the Office of Legal Affairs at Headquarters and from 23 January to 23 March 1989 with the Registry of the International Court of Justice at the Hague. Then, on 27 March 1989, the Applicant accepted a one-year fixed-term appointment as Senior Legal Liaison Officer at the U.N. Office at Vienna. He resigned voluntarily from this post for personal reasons, effective 31 August 1989.

In the meantime, on 31 March 1988, the Applicant submitted a further statement of appeal which replaced in its entirety, the initial appeal before the JAB.

The Board adopted its report on 14 March 1989. Its conclusion and recommendation read as follows:

"Conclusion

35. Based on the information presented, the Panel was not satisfied with the efforts by the Administration, and in particular the then OPS, to consider the Appellant fairly and objectively against alternative suitable positions within the United Nations Secretariat and throughout the United Nations system, [sic] were carried out adequately as regards the Administration's special responsibility to retain a permanent staff member in preference to those with other forms of contractual status.

36. The Panel's dissatisfaction was confirmed when it learned that the Appellant, barely one and a half years after the termination of his permanent appointment, received a contract by the U.N. Secretariat for almost six months service with the Office of Legal Affairs [OLA]. While considering his case, the Panel was informed by the Appellant that he was, at the time of Panel proceedings, working on a two months assignment with the Registry of the International Court of Justice [ICJ] and that he had accepted another six-months contract for service with the Office of Legal Affairs which he was offered in January 1989 and which he intends to start immediately after his assignment with the ICJ. The Panel had to conclude from this information that the Appellant's qualifications in legal matters are recognized by the U.N. and that his skills and competence in that specific field are considered valuable.

Recommendation

37. Based on the above, the Panel recommends (a) that the Appellant's present retirement status be suspended and (b) that the Office of Human Resources Management [Successor of OPS] undertakes all efforts to re-employ the Appellant and consider him as an internal candidate, preferably by extending his assignment with OLA beyond the six-months limit for retired employees until he reaches the full retirement age of 60."

On 8 August 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had, in the light of the Board's report, decided to maintain the contested decisions and to take no further action in his case on the following grounds:

"... The Secretary-General has noted the Board's finding that the abolition of your post was due to purely economic considerations -- a justifiable cause -- and that the post remains abolished to date (...). With regard to the doubts expressed by the Board as to whether the efforts undertaken by OPS ... to find a post for you were adequate in the light of Staff Rule 109.1(c)(i), the Secretary-General is of the view that good faith efforts were made to find a position for you following the abolition of your post, as manifested by your being granted a number of short-term assignments. The fact that your skills and competence were found appropriate for these short-term appointments subsequent to your termination does not mean that, at the time of the efforts to find you a position, a post was available to which your skills and competence were appropriate. At any rate, any obligations that existed in regard to you under Staff Rule 109.1(c)(i) were discharged when a one-year appointment in Vienna was given to you in March 1989 - a position from which you later decided to resign."

On 5 September 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Far from having discharged his obligation to indicate to the Applicant explicitly and specifically the facts which constituted the grounds for the termination of his contract, the Respondent has, in effecting that termination, shown a blatant lack of objectivity and seriousness.

2. As a result of a very large gap in the Applicant's performance record, the Administration's obligation to consider him fairly and objectively for alternative posts was not properly fulfilled.

3. The Applicant was not demonstrably considered at all for another UNEP post for which he was by no means prima facie unqualified.

4. An analysis of the background to the termination of the Applicant's appointment shows no justifiable cause for that termination, which corroborates the Applicant's charge that it was carried out in bad faith.

Whereas the Respondent's principal contentions are:

1. The decision of the Secretary-General to terminate the Applicant's permanent appointment for abolition of post under Staff Regulation 9.1(a) was a valid exercise of his authority which did not violate the Applicant's rights.

2. Motivation for abolition of the Applicant's post was proper.

3. The Administration made good faith efforts to find the Applicant another position.

The Tribunal, having deliberated from 18 October to 9 November 1990, now pronounces the following judgement:

I. In this case, the Tribunal must decide whether the separation from service of the Applicant, a staff member holding a permanent appointment, on the ground of the abolition of the post he occupied, was in conformity with the Staff Regulations and Rules (i.e. Staff Rule 109.1) and whether the Respondent made genuine efforts to effectively utilize the staff member's

services in another suitable post, in accordance with Staff Rule 109.1(c), in particular by retaining him in preference to staff on all other appointments.

II. The Applicant alleges that the abolition of his post as Legal Liaison Officer with UNEP at Nairobi by the UNEP Executive Director, which, he was told, resulted from a decision by the UNEP Governing Council, and the termination of his appointment with effect from 21 May 1986, were in fact not based on a decision by the Governing Council, as the Council took no such decision. Instead, the Applicant claims that the decision to abolish his post and the reason therefor, cast serious doubts on the good faith of the Administration. Moreover, he alleges, the decision was procedurally flawed because the Administration failed to discharge its obligation to inform him explicitly and specifically of the grounds for the termination, an omission which, the Applicant claims, rendered his termination invalid.

III. The Respondent contends that the abolition of the post encumbered by the Applicant was entirely proper, motivated solely by objective considerations of economic and budgetary requirements, of which he was fully advised.

IV. As regards alternative employment, the Respondent contends that the requirements of Staff Rule 109.1(c) were fully met, as he had considered the Applicant for numerous vacant positions, but had been unable to find a suitable one, which he could fill. He further contends that the mere fact that the Applicant was subsequently employed on short-term contracts, by the U.N. and by some of its organs is no proof to the contrary. Moreover, the Respondent observes that the Applicant was given a one year fixed-term appointment at the P-5 level, effective 27 March 1989, as Senior Legal Liaison Officer for the U.N. Office in Vienna, from which he resigned some five months later.

V. The Tribunal finds, in the light of the evidence submitted by the parties, that the reason given for the termination of the Applicant's permanent contract, namely the abolition of the post of Legal Liaison

Officer at UNEP, was genuine. The Tribunal cannot find any evidence of an attempt by the Respondent to improperly rid the Organization of the services of the Applicant.

VI. The Tribunal takes note, in this context, of the finding by the Nairobi Joint Appeals Board (JAB), to the effect that it "was unable to find evidence supporting [the Applicant's] contention that the Administration's statements of fact which constituted the grounds for termination were arbitrary, demonstrated lack of objectivity or seriousness or were tainted with bad faith".

VII. The Tribunal now turns to the question whether genuine efforts were made by the Respondent to find a suitable alternative post for the Applicant, in conformity with Staff Rule 109.1(c). The Tribunal finds that such efforts were made. The mere fact that they were not successful is not evidence to the contrary, nor will the Tribunal retroactively impose its own view concerning the suitability of any candidate for a vacancy, upon the view expressed by the Secretary-General in the exercise of his duty and authority to do so, provided it finds no improper motive or bias in that exercise.

VIII. On the other hand, the Tribunal will examine if there was a lack of due process in the consideration of the Applicant for any of the vacancies which seemed suitable.

IX. The procedures for such consideration involve the examination of the Performance Evaluation Report (performance report) of the candidate for any post, which, in the words of the JAB, is of "crucial importance in enabling a fair and objective evaluation of qualifications for [an] alternative post".

X. The Tribunal finds, in this case, that there was a considerable gap in the performance report evaluating the Applicant's services during the period January 1983 to September 1984. Also, there was doubt on the accuracy of the performance report evaluating the Applicant's services during the period running from 1 July 1980 to 14 February 1983, due to questions concerning the authority of the officers signing the reports. The

gap and the uncertainty were due to actions by officials of UNEP's Personnel Services and other administrators who declined to sign the required reports, claiming that it was not their responsibility, but someone else's responsibility to do so.

XI. While there is, of course, no guarantee that had there been no lacunae in the Applicant's performance reports, a suitable post would have been found for him, the Tribunal agrees with the JAB's findings that "it was incumbent upon the Administration to make every effort in completing the Performance Evaluation Report".

XII. Failure by the Administration to do so, amounts to a denial of due process and the Tribunal concludes that the Applicant is entitled to an indemnity as compensation for the injury he has sustained. The Tribunal assesses this compensation at an amount equivalent to three months of the Applicant's net base salary at the time of his separation from the service of UNEP.

XIII. For the reasons set forth above, the Tribunal orders the Respondent to pay to the Applicant an amount equivalent to three months of the Applicant's net base salary at the time of his separation from the service of UNEP.

XIV. All other claims are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

New York, 9 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary